IN THE SUPREME COURT OF MISSOURI

STATE ex. rel. JAMES L. LYBARGER

Relator,

vs. Case No. SC84657

THE HONORABLE MICHAEL L. MALONEY,

Respondent.

RELATOR'S REPLY BRIEF

Submitted by:

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ATTORNEY FOR RELATOR

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STATEMENT OF FACTS

Relator incorporates by reference the Statement of Facts as submitted with his initial Brief and Argument as filed on October 15, 2002. Review of the Statement of Facts as submitted in brief by Respondent suggests one misstatement of fact and a number of omissions which for clarity should be included in a final rendition of the facts in this matter.

Relator would address only the dates with which he would take exception with the Statement of Facts contained in Respondent's brief:

***02/18/01:** Relator received notice of the Indictment in 5085 by way of a "Detainer Notice" (See Exhibit p. A-1), which did in deed inform him of pending charges, but incorrectly listed the charges as being "Rob 2nd Degree, Rob 1st Degree x 3", presumably meaning to inform the defendant he was charged with one count of Robbery in the Second Degree and three counts of Robbery in the First Degree when in point of fact he was charged with two counts of Robbery in the Second Degree, one count of Robbery in the First Degree, and two counts of Attempted Robbery in the First Degree. It should also be noted that a copy of this Detainer Notice should have been routinely sent to the Sheriff of Clay County (specifically the "Canary" copy). This copy should have served to give notice to Clay County officials not only of the fact that Relator (Defendant therein) had been misinformed of the charges, but also that the form used failed to inform Relator of his right to request disposition of the detainer. Therefore, the

Respondent is incorrect in suggesting in brief that Clay County officials had no way of being aware of deficiencies in the Kansas process of informing Relator of their detainer. As of 02/18/00, they should have been fully aware that Relator had not been properly informed of his rights.

***02/28/01:** As noted by Respondent, a corrected Form IV (Offer to Deliver Temporary Custody) (See Exhibit p. A-3) was sent to the Clay County Prosecuting Attorney, but still applicable only to 4474, not 5085. Also on this date, the Relator's Form II requesting disposition of the detainer in 4474 (See Exhibit p. A-2) was filed by the Clay County Circuit Clerk, not in the file of 4474, but in the file of 5085. As of this date, Relator had not been informed in writing of his right to request disposition of the detainer in this matter (5085) and certainly had made no such request in the case. Finally, on this date, the Prosecuting Attorney filed Nolle Prosequi dismissing 4474. On 03/01/01, Relator was informed of this dismissal.

***03/02/01:** The Clay County Prosecuting Attorney executed Form VII (See Exhibit p. A-4), clearly applicable only to 4474, accepting temporary custody of Relator in connection with his request for disposition of the detainer in 4474. In this acceptance, the Prosecuting Attorney stated and the Respondent Judge certified the following: " . . . I accept temporary custody and that I propose to bring this person to trial in the indictment, information or complaint *named in the offer* (being 4474 only) within the time specified in Article III (a) of the Agreement on Detainers." This statement was made in writing by the Assistant

Prosecuting Attorney and certified by Respondent as to a case which only two days earlier had been dismissed. Nevertheless, Relator was ultimately returned to Missouri for trial, in 5085 not 4474, on the basis of this document and the others pertaining to 4474 which lead to its execution and certification.

***03/05/01:** As noted in Respondent's Statement of Facts, on this date Relator was presented with Kansas Form I, "NOTICE OF UNTRIED INDICTMENT, INFORMATION , OR COMPLAINT AND OF RIGHT OT REQUEST DISPOSITION," applicable to 5085 (See Exhibit p. A-5). This form also failed to accurately list the charges pending against Relator, as had the Detainer Notice of 02/18/00, though it was different in that it informed Relator he had two pending charges of Robbery 2nd Degree as opposed to the original suggestion of one. Respondent's Statement of Facts indicates that Relator refused to sign "stating that he thought his previous request for disposition covered these charges also." Examination of the notation placed on the inmate's signature line on the form by Lana Houston, the records clerk, accurately reflects the Relator's reaction to this notice. Ms. Houston recorded the following: "I/M (inmate) changed mind – would not sign – *thinks <u>all</u> are cancelled now."* (Emphasis, except the underline, added) The Prosecuting Attorney's dismissal of 4474 coupled with the previous exchange of paperwork regarding that case, culminating in the previously discussed Form VII accepting custody to bring him to trial on the indictment "named in the offer" (4474), lead Relator to the obvious conclusion, which he stated on 03/05/01, that "<u>all</u> are cancelled now". (Exhibit p. A-5

TABLE OF CASES, STATUTES, AND OTHER AUTHORITY

CASES

STATUTES

POINTS RELIED ON

1. Relator is entitled to an order prohibiting Respondent from taking any further action in *State of Missouri vs. James L. Lybarger,* Case No. CR199-5085F (hereinafter "5085"), now pending in the Circuit Court of Clay County, Missouri, and particularly Count I of that case, because of the failure of the State of Missouri to bring the Relator to trial in Case No. CR199-4474F (hereinafter "4474"), which was also filed as Count I in 5085, as required under the terms of Section 217.490 RSMo, Article V, Paragraph 3 in that on March 3, 2001, the Clay County Prosecuting Attorney accepted custody of Relator from the State of Kansas for the express purpose of prosecuting him in 4474 which was at the time of the acceptance an impossibility since that charge had been previously dismissed on February 28, 2001, and, further, in that the State of Missouri continued to act in a case which had been dismissed (4474), transporting Relator to Missouri and proceeding to trial, without any request for disposition of detainer by Relator, without any offer of temporary custody from the State of Kansas, or without any acceptance of custody from the State of Kansas, in 5085 all in violation of the clear terms of Article V, Paragraphs 3 and 4 of Section 217.490, RSMo (The "Agreement on Detainers", hereinafter the "AOD").

a. *State ex rel. Clark v. Long,* 870 S.W.2d 932 (MoApp S.D. 1994)

b. *Carson v. State,* 997 S.W.2d 92 (MoApp S.D., 1999)

c. Section 217.490, Article V, Paragraphs 3 and 4

d. Section 217.490, Article I

ARGUMENT

1. Relator is entitled to an order prohibiting Respondent from taking any further action in *State of Missouri vs. James L. Lybarger,* Case No. CR199-5085F (hereinafter "5085"), now pending in the Circuit Court of Clay County, Missouri, and particularly Count I of that case, because of the failure of the State of Missouri to bring the Relator to trial in Case No. CR199-4474F (hereinafter "4474"), which was also filed as Count I in 5085, as required under the terms of Section 217.490 RSMo, Article V, Paragraph 3 in that on March 3, 2001, the Clay County Prosecuting Attorney accepted custody of Relator from the State of Kansas for the express purpose of prosecuting him in 4474 which was at the time of the acceptance an impossibility since that charge had been previously dismissed on February 28, 2001, and, further, in that the State of Missouri continued to act in a case which had been dismissed (4474), transporting Relator to Missouri and proceeding to trial, without any request for disposition of detainer by Relator, without any offer of temporary custody from the State of Kansas, or without any acceptance of custody from the State of Kansas, in 5085 all in violation of the clear terms of Article V, Paragraphs 3 and 4 of Section 217.490, RSMo (The "Agreement on Detainers", hereinafter the "AOD").

As discussed at page 17 of Relator's Brief and Argument, the policy and purpose of the AOD is "to encourage the expeditious and orderly disposition of such charges" – being charges which form the basis of detainers upon inmates in

penal custody. The manner of disposition of the detainers filed upon Relator while he was in the custody of the State of Kansas failed abjectly to meet this policy and purpose.

Without revisiting the timing or adequacy of any notice received by Relator in either 5085 or 4474, but not waiving any claim of error made in earlier brief concerning the same, Relator would review briefly the operative facts as follows: On 02/23/01, the Relator first received notice of the detainer in 4474 which advised him of his right to request disposition of that detainer. In advising Relator of his right to request disposition of the detainer in 4474, the notice (on Kansas Form I) provided in part as follows: "Your request for final disposition will operate as a request for final disposition of all untried indictments, information or complaints on the basis of which detainers have been lodged against you from the state to whose prosecuting official your request for final disposition is specifically directed." (See Exhibit p. 6) Based on the above statutory admonition and the fact that only the detainer in 4474 was presented, Relator could reasonably have and did operate on the assumption that this was the only detainer then outstanding from Clay County.

On 02/28/01, the Prosecuting Attorney filed his Nolle Prosequi dismissing 4474. But, this dismissal did not end state action in that case. Critically important transactions continued to transpire under the caption of this closed matter. On the same day, Relator's Notice of Place of Imprisonment and Request for Disposition of Indictments, Information or Complaints (Exhibit p. 2) was filed in the office of

the Clay County Circuit Clerk, not in 4474, as on its face it should have been, but in 5085. On 03/02/01, the Prosecuting Attorney executed and the Respondent Judge certified as correct, a "Prosecutor's Acceptance of Temporary Custody Offered In Connection With a Prisoner's Request For Disposition of a Detainer", Kansas Form VII (Exhibit p. 4). By the terms of the acceptance, the Prosecuting Attorney acknowledged the offer of temporary custody from the State of Kansas, **in 4474**, and accepted, stating: "I propose to being this person to trial on the indictment, information or complaint *named in the offer* (emphasis added) within the time specified in Article III (a) of the Agreement on Detainers." This was, of course, impossible of accomplishment at the time the acceptance was executed and certified, since the charge had already been dismissed.

Article V, Paragraph 3 of the AOD provides: "If the appropriate authority shall refuse or fail to accept temporary custody of the person (which was not the case here), or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV of this agreement, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice. . ." The Prosecuting Attorney of Clay County obviously could not comply with the dictates of the statute to bring Relator to trial in 4474, because the case was dismissed prior to his acceptance of custody. Can the State avoid this outcome by turning to the same charge as filed in 5085 as Count I? For reasons

dictated not only by the clear language of the statute but also for reasons of policy, the answer must clearly be: no. Relator was not "brought to trial (in 4474) within the period provided in article III . . . of the agreement". This being the case, the statute clearly provides for one and only one remedy: "an order dismissing the same with prejudice. . ." Acceptance of the Respondent's suggestion that the matter can continue to trial under the heading of Count I in 5085 could lead by logical extension to a scenario such as this: An inmate requests disposition of a pending detainer in proper form. The receiving state accepts temporary custody. Then, for violation of the 180 days requirement of Article V, Paragraph 3 looses jurisdiction and the case is dismissed with prejudice. The receiving state, if still within the time limit of the Statute of Limitations, would simply re-file the case and start the process over, as basically happened when Relator was presented with a proper Notice of Detainer on March 5, 2001, in 5085, following dismissal of 4474.

In arguing the view above, Relator would suggest that the language of the statute is very clear and not subject to interpretation. The accepted rule of statutory construction in such a case was well stated by the Southern District in the case of *State ex rel. Clark v. Long*, 870 S.W.2d 932 (MoApp S.D. 1994). The court opined: "In interpreting a statute, we are mindful that, insofar as possible, legislative intent is to be determined from the language of the statute itself, *State v. Sweeney*, 701 S.W.2d 420, 423 (Mo. banc 1985). In doing so, words used in statutes are considered in their plain and ordinary meaning. Citing authority. The

legislature is presumed to have intended what the statute says, and if the language used is clear and unambiguous there is no room for construction. Citing authority."

Additionally, Relator suggests that the "clear and unambiguous" language of AOD Article V, Paragraph 4 requires dismissal of **all of the counts in 5085.** Paragraph 4 provides, in part, as follows: "The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictment, information, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction." The only detainer which was being actively processed, or was ever processed under the AOD, was that in 4474. No documents specifically pertaining to the Agreement on Detainers were ever executed carrying the case number in 5085. Upon Relator's refusal on 03/05/01 to request disposition of a detainer in 5085 when presented with the paperwork to do so, Clay County officials completely abandoned any further reliance upon the AOD in that case, choosing to proceed in 4474, which, as previously discussed, had been dismissed. Therefore, when Paragraph 4 speaks of prosecution of any "untried indictments, informations, or complaints which form the basis of the detainer or detainers", the only detainer to which it can make reference in this set of facts is that in 4474. Case 5085 was never brought under the auspices of the AOD since the authorities in Clay County did not receive a request for disposition of detainer from Relator under Article III

and initiated no proceedings for Relator's return under Article IV, as they clearly could have done had they so elected. Arguably, the limitation of Paragraph 4 could still have been satisfied if these five counts had arisen "out of the same transaction". Count I of 5085 did not arise "out of the same transaction" as 4474. As the state concedes in its brief, it is the **same exact case**, and, therefore, barred by dismissal of 4474, as previously discussed. The other four counts bear no connection to the facts set out in 4474 / Count I of 5085, other than Relator being charged and the alleged occurrences having transpired in Clay County. They certainly cannot be said to have arisen "out of the same transaction" as 4474, upon the authority of which Relator was brought to Missouri. To allow trial upon any of the counts in 5085 would clearly violate the unambiguous limitation upon prosecution which forms the basis of Article V, Paragraph 4.

Relator would suggest that the guidance of *State ex rel. Clark v. Long*, cited above, applies with equal force to the interpretation and application of Paragraph 4 of Article V to the facts at bar. The statute can have only one meaning, and this clear and unambiguous statement must be that temporary custody received by the officials of Clay County cannot be used for the purpose of trying the indictment in 5085 – The clear terms of the statute prohibit it. To the same effect, see *Carson v. State,* 997 S.W.2d 92 (MoApp S.D. 1999), quoting the Western District in *Russell v. State,* 597 S.W.2d 694,697. The *Carson* court stated the following: " (t)he court said that the provisions of the UMDDL are not drenched in doubt or ambiguity, and 'a loss of subject matter jurisdiction inexorably occurs by

operation of law when an imprisoned person who has initiated a proper request is not brought to trial within the appropriately determined statutory time period.'" Relator respectfully suggests that the exact same thing can be said of the AOD and the express provisions of Article V, Paragraph 4. Relator, in proper fashion, requested disposition only of 4474, which had been dismissed. At the time Relator executed a request for disposition of the 4474 detainer and the Clay County Prosecuting Attorney accepted an offer of temporary custody in that case (only), Relator had not received any proper statutory notice of the detainer in 5085, with a statement of his right to request disposition of the same; had filed no request for disposition of detainer in 5085; and the state had initiated no such request under Article IV. Clearly, the temporary custody granted by the State of Kansas permitted only prosecution of 4474 and not 5085. Case No. CR199-5085F should not be permitted to proceed. To allow it to do so would give license to any prosecuting authority in Missouri to procure the return of an out-of-state inmate on the basis of a totally unassociated charge, possibly one of considerably lesser seriousness, and then, once he is in Missouri, proceed to prosecute the hapless defendant on another charge or charges, which might not have even been the subject of any detainer. The defendant, in requesting disposition for all the proper reasons suggested in Article I of the AOD, could, by the reasoning propounded by the Respondent, be left open to prosecution on any number of unassociated charges of which he may have been totally unaware when he initiated a process intended to clear away "uncertainties which obstruct programs of prisoner

treatment and rehabilitation". Section 217.490, Article I. An outcome such as this would leave inmate's incarcerated outside of the State of Missouri, but with pending Missouri charges, with the option of leaving those charges pending indefinitely, with all the harmful effects arising from such a situation (as discussed in Relator's original brief), or requesting disposition of a known detainer of which he has been properly informed and then returning to the receiving state to face any number of charges, known and / or unknown at the time of the execution of the request. Such simply could not have been the intention of the original drafters of the uniform statute or the legislature in adopting it.

SUMMARY

A prosecuting attorney in Missouri, having received an offer of temporary custody from a sending state, has only one option under the express terms of Article V, Paragraph 3. He or she must bring that inmate / defendant to trial within the period provided for in Articles III or IV. The Clay County Prosecuting Attorney accepted temporary custody of the Relator from the State of Kansas in Case No. CR199-4474 only. His only option in that situation, and under the facts charged in that case, was trial. That course of action was closed to the prosecutor, by his own action, ab initio. He had already dismissed the case. This court must prohibit the prosecuting attorney and the Respondent Judge from resurrecting this case, otherwise subject to mandatory dismissal by the court with prejudice, by simply proceeding under a different case number.

The prosecution of all counts of 5085 would violate the terms of Paragraph 4 of Article V. The limitation of that section clearly provides that temporary custody obtained through the processes of the Agreement on Detainers can be used to prosecute an inmate only on the "untried indictments, informations, or complaints which form the basis of the detainer". It cannot be used by a prosecuting attorney to bring a defendant to the State of Missouri under its authority in one case, and then to proceed to prosecute that defendant under charging documents and in cases which have not received any attention under the Act. The only exception would be for charges arising out of the same transaction as the charge or charges which formed the basis for the defendant's proper transfer

to Missouri. Count I of 5085 is the same exact charge as 4474 and barred for the reasons discussed above. Counts II, III, IV, and V of 5085 clearly do not arise out of the same transaction. As alleged, they involve crimes at different times, at different locations, and involving different persons than the crime originally charged in 4474 and on the basis of which the State of Kansas transferred custody for the purpose of prosecution.

For all the reasons set forth above, Relator respectfully requests that this court permanently bar the Respondent Judge and the Circuit Court of Clay County, Missouri, from proceeding further in Case No. CR199-5085F.

Respectfully submitted,

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CERTIFICATE UNDER SPECIAL RULE NO. 1, RULE 84.06

Undersigned Attorney for Relator hereby certifies, as required by Special Rule No. 1, Rule 84.06 the foregoing Reply Brief, submitted by Relator:

1. Includes the information required by Rule 55.03
2. Complies with the limitation contained in Special Rule No. 1 (b).
3. Contains 3,840 words, in total.

Further, undersigned Attorney for Relator hereby certifies, s required by Special Rule No. 1 (f), that the floppy disk filed herewith, containing the Relator's Reply Brief in full, is fully compliant with the requirements of said Rule. Specifically, that the disk is an IBM-PC compatible 1.44 MB, 3 ½ inch size and that it is, to the undersigned's best knowledge and belief, virus-free.

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